IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

BRIAN MCEVOY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 14-1-00674-6

BRIEF OF RESPONDENT

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SERVICE	John Henry Brown 801 Second Ave., Ste. 800 Seattle, WA 98104 Email: johnhenry@jhblawyer.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED November 8, 2017, Port Orchard, WA **Original e-filed at the Court of Appeals; Copy to counsel listed at left.** **Office ID #91103 kcpa@co.kitsap.wa.us**

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2. Whether the trial court erred in refusing to conduct a sentencing hearing de novo at the defendant's request when tasked by the Court of Appeals with correcting the judgment and sentence where the trial court exercised no discretion in so correcting?

3. Whether an upward departure from the standard range was appropriate where the jury found a statutory aggravating factor and the trial court properly considered its discretion in so sentencing?

(a) Whether McEvoy may challenge the exceptional sentence in a notice of appeal filed nearly three years after sentencing?

II. STATEMENT OF THE CASE[1]

A. PROCEDURAL HISTORY

Brian McEvoy was charged by second information filed in Kitsap County Superior Court with Rape in the Second Degree (attempt) (domestic violence) (count I), Assault in the Second Degree (domestic

[1] Procedure and fact statements are copied from the state's responsive brief in 46795-0-II, McEvoy's first appeal. Citation is to the record in that case. A motion to transmit the record from 46795-0-II has been asserted by the state.

violence) (count II), two counts of Felony Harassment (domestic violence) (Threat to Kill) (counts III and XII), Unlawful Imprisonment (domestic violence) (count IV), Assault in the Fourth Degree (domestic violence) (count V), Interfering with Reporting Domestic Violence (domestic violence) (count VI), Malicious Mischief in the Third Degree (domestic violence) (count VII), three counts of Violation of a Court Order (gross misdemeanor) (domestic violence) (counts VIII, IX, and XI), Felony Stalking (domestic violence) (count X), Attempting to Elude Pursuing Police Vehicle (count XIII) and Unlawful Possession of a Firearm in the Second Degree (count XIV). CP 45-55.

A jury found McEvoy guilty of counts II through VIII and counts X through XIV, including the special allegation that counts II through VIII and counts X through XII were committed against a family or household member. CP 161-177. The jury also found the aggravating circumstance on Count II that the offense was committed within sight or sound of the victim's or Defendant's minor children. CP 167. The jury acquitted McEvoy on Counts I and IX. CP 161, 164. The trial court imposed an exceptional sentence totaling 234 months minus five days. CP 227-239.

1. Appeal and Remand

On appeal, this Court affirmed McEvoy's conviction in almost all respects. *See* Opinion in case number 46795-0-II, which is appended to

McEvoy's brief. The Court of Appeals held that two misdemeanor violations of no contact orders were proof of and therefore merged into the stalking conviction. The matter was remanded with orders to strike those no contact order convictions.

The trial court complied with the appellate court's orders. *See* transcript of remand hearing also appended to McEvoy's brief. In doing so, the trial court refused, at McEvoy's request, to reopen consideration of the sentence. Id.

B. FACTS

1. Counts II through VII

Kara McEvoy and Brian McEvoy were married for sixteen years. RP (9/10) 431. McEvoy had been a deputy with the Kitsap County Sheriff's Office (KCSO) for approximately ten years. RP (9/9) 189. In April 2014, the two were having issues in their marriage, including a brief separation a few months prior. RP (9/11) 502-05.

On April 14, 2014, Ms. McEvoy got home between 6:00 p.m. and 6:15 p.m. and McEvoy demanded to know why she was late. RP (9/10) 432. Ms. McEvoy told him that she had been looking at apartments, which angered him. RP (9/10) 432. Ms. McEvoy left with a friend a few minutes later, leaving her car and a spare set of car keys at the home. RP (9/10) 433. Ms. McEvoy returned home around 11:00 p.m. and McEvoy

was awake, sitting on the couch. RP (9/10) 434. She sensed that he was very upset with her, so she tried to act calm and went about her business. RP (9/10) 434.

Ms. McEvoy went to her room with the intent of getting her stuff to leave and McEvoy followed her there. RP (9/10) 435. Once in the bedroom, he told her "You're not going to bed. You're going to suck my dick." RP (9/10) 435. McEvoy then laid down on the bed and pointed to his crotch. RP (9/10) 436. Ms. McEvoy told him that she was not going to do that and attempted to get her things to leave. RP (9/10) 436. McEvoy then got off the bed and grabbed Ms. McEvoy, throwing her on the bed telling her to "Suck my dick, bitch. Suck my cock. You're going to do this. I'm going to get something out of you." RP (9/10) 436. McEvoy was standing right in front of Ms. McEvoy and he would not let her get up—she started screaming, so he told her to shut up and hit her on the side of the head. RP (9/10) 437. He then struck her on the other side of her head and grabbed her hair, pulling her head down to his crotch, telling her to "suck his dick". RP (9/10) 437-38. He was pulling her hair hard enough that Ms. McEvoy could not get up or away and he pulled out a chunk of her hair in the front. RP (9/10) 438. The next day, Ms. McEvoy found that her head was extremely swollen, including a large bump. RP (9/11) 485. She also had bruising on her nose and under her

eyes. RP (9/11) 487. It took three to four months for the hair that was pulled out to grow back. RP (9/11) 637.

After McEvoy pulled out her hair, Ms. McEvoy started screaming for their 15 year old son Dylan to come help her because she could not leave the room. RP (9/10) 430, 439. Dylan came into the room and saw his mom curled up and covering her face while his dad hit her multiple times. RP (9/10) 390. At that point, their nine year old daughter Kaitlyn had awoken and she also came into the room. RP (9/10) 430, 440. Ms. McEvoy told Kaitlyn to call for help and both she and Dylan left. RP (9/10) 440-41. As Dylan headed to the kitchen to get his mom's phone to call 911, McEvoy grabbed his shirt in the hall, ripping it. RP (9/10) 391-92. He told his sister to go grab the phone, but McEvoy chased her down and was able to grab it before she was. RP (9/10) 392-93.

In the kitchen, McEvoy picked up his wife's phone and threw it on the floor repeatedly until it was smashed. RP (9/10) 441-442. Ms. McEvoy then grabbed her purse and keys and ran out of the house. RP (9/10) 442. As she was leaving, McEvoy said "Get back here bitch. I'm going to come get you." RP (9/10) 443. McEvoy grabbed both his and Dylan's phones and followed Ms. McEvoy outside. RP (9/10) 394. Ms. McEvoy was able to get into her car on the driver's side, where she locked the doors. RP (9/10) 443-44. McEvoy made a comment implying that he

had done something to car and when Ms. McEvoy tried to start it, she found that there was no power when she pressed down on the accelerator. RP (9/10) 444. The car had been working when she drove it earlier that day. RP (9/10) 444.

McEvoy began punching the driver's side window, saying "Hey bitch, I'm going to come fucking kill you." RP (9/10) 444-45. Ms. McEvoy was able to get the car started, but it would only travel at a slow rate of speed. RP (9/10) 445. McEvoy jumped on the hood of the car and began punching the windshield with both fists, causing it to crack. RP (9/10) 445. Ms. McEvoy drove the car towards a neighbor's house, but it stalled before she could get there. RP (9/10) 446-47. McEvoy got off the hood and using the spare key, opened the door and shoved her over to the passenger side. RP (9/10) 447. Ms. McEvoy began screaming and honking the horn, stopping after McEvoy threatened to kill her if she did not. RP (9/10) 448. She tried to get out of the car, but McEvoy had a strong grip on her hair and kept pulling her back. RP (9/10) 448-49. Ms. McEvoy finally told him that she would do what he wanted, so he turned down an unfamiliar dirt road. RP (9/10) 451. McEvoy opened the door and Ms. McEvoy saw that his hands were swollen, bloody and wrapped in her hair. RP (9/10) 451. McEvoy then ordered her out of the car and to open the hood, using his phone as a flashlight. RP (9/10) 452. Ms.

McEvoy was hyperventilating and shaking so bad that he had to open the hood for her, and she saw him reach towards the back and re-attach something. RP (9/10) 452. McEvoy ordered her back into the car and too scared to not comply, Ms. McEvoy did. RP (9/10) 453.

With the car now running normally, McEvoy headed back towards their house, but panicked when he thought he saw a police car and kept driving. RP (9/10) 454. He turned around and they could see their kids in the road, flagging them down. RP (9/10) 454. Ms. McEvoy begged him to let her out, but he continued driving past the house for a second time. RP (9/10) 454-55. McEvoy turned around again, returned to the house and kicked her out of the car, telling her several times that if she called the police, he would kill her. RP (9/10) 455. He eventually left and Ms. McEvoy called the police the next day, waiting because she took his threats seriously. RP (9/10) 456-57, 459.

2. Count VIII

On April 11, 2014, the Kitsap County District Court issued a Domestic Violence No Contact Order, preventing McEvoy from coming within 500 feet of Ms. McEvoy's residence, school, or place of employment. CP 378-79. The order also prevented him from having any contact with her at all, including in-person contact, telephone contact, or electronic communication. CP 378-79.

William Blaylock lives across the street from the McEvoys. RP (9/12) 675. On the morning of April 12, 2014, Mr. Blaylock saw McEvoy go to the mailbox and get his mail. RP (9/12) 676. Mr. Blacklock then had a brief conversation with McEvoy where McEvoy told him twice that "he was not supposed to be here." RP (9/12) 676-77. Ms. McEvoy said that they did not receive much mail at the house because McEvoy was paranoid that someone would steal it; instead, bills had been sent to a P.O. Box for over fifteen years. RP (9/11) 493. Detective Nicole Menge found that the distance between the mailbox and the residence was less than 500 feet. RP (9/9) 207.

3. Counts X through XII

On May 13, 2014, Ms. McEvoy was at work where every call that comes in is recorded. RP (9/11) 513-14. McEvoy called her at work that day. RP (9/11) 521-22. During the call, which lasted several minutes, McEvoy stated that "You know what, Kara, you've got a very short time on this earth. You better hope somebody finds me before I find you. You've…you've ended…you've taken away my house, all my property and my kids; do you realize that?" CP 404. He also stated "Well, you'll…you'll…I'm gonna find you, Kara. You and I are gonna have one last reckoning I guarantee that." CP 405-06. He told her that she had "forced his hand" and that he was going to find her. CP 406. When she

asked what he was going to do if he found her, McEvoy stated "Well, you'll find out…you'll find out. You know what? You've…you've made it very difficult for me to do the right thing." CP 407. McEvoy ended the call stating "Hey, Kara, I'm gonna find you, that's all I gotta say." CP 408. Detective Menge found the phone call to be "chilling", noting that McEvoy's demeanor was unusually calm given what was being said. RP (9/9) 222.

Ms. McEvoy believed that McEvoy was threatening to find her and kill her, threats she took seriously because of their history. RP (9/11) 523. To her, his voice was calm and he sounded direct and focused, which scared her. RP (9/11) 524. Concerned that McEvoy was close by, Ms. McEvoy had a co-worker move her car and she left work, meeting up with a police escort. RP (9/11) 525. She then went to stay at a co-worker's house in Tacoma, a place that McEvoy had never been before. RP (9/11) 525.

4. Counts XIII and XIV

On May 19, 2014, law enforcement located McEvoy's vehicle at the Tides Tavern in Gig Harbor, Washington. RP (9/12) 729. Multiple law enforcement agencies responded to the scene, including the U.S. Marshall's Office, Kitsap County Sheriff's Office and Pierce County Sheriff's Office. RP (9/12) 729-30. Agent Raymond Fleck of the U.S.

Marshall's Office encountered McEvoy in an alley near Tides Tavern. RP (9/15) 804. McEvoy raised his hands and Agent Fleck activated his police lights. RP (9/15) 805-06. Agent Fleck, wearing a tactical vest with the US Marshall star logo on it, stepped out of his vehicle, drew his firearm, and yelled "Police." RP (9/15) 806-07. McEvoy responded by reversing his car out of the alley and driving away at a high rate of speed. RP (9/15) 806; RP (9/12) 730-31.

Agent Jacob Whitehurst of the U.S. Marshall's Office was in the area of Tides Tavern when he heard that McEvoy had been located. RP (9/12) 731-32. Agent Whitehurst drove to the intersection of Soundview and Grandview when he heard that McEvoy was headed in that direction. RP (9/12) 733-34. Agent Whitehurst was parked across both lanes of Soundview with his blue and red police lights on when he saw McEvoy heading towards at him a high rate of speed and it appeared that he was accelerating. RP (9/12) 734. Fearful that he was going to get hit, Agent Whitehurst pulled his car forward a bit and McEvoy swerved around him without slowing down. RP (9/12) 734. Agent Whitehurst followed McEvoy who turned into the parking lot of the Olympic Village Shopping Center. RP (9/12) 735. After driving erratically around the parking lot, McEvoy attempted to leave through another entrance where he rammed into the vehicle of another agent, which stopped his car. RP (9/12) 736.

McEvoy's vehicle was searched on May 19, 2014. RP (9/9) 257. During the search, Detective Menge located a pair of handcuffs in the driver's side door compartment and a knife in a compartment behind the back seat. RP (9/9) 260, 265. A blue tarp was located behind the driver's seat containing screwdrivers and a pair of bolt cutters. RP (9/10) 275. Also located in the truck were a flashlight, latex gloves, a multi-purpose tool and a roll of string. RP (9/10) 275. Detective Menge found multiples receipts in McEvoy's truck as well as a gray and black beanie cap and a pair of gloves inside the driver's compartment. RP (9/10) 295.

A .38 caliber Colt revolver in a soft case along with a bag of ammunition was also found in the vehicle under the seats. RP (9/10) 301, 305-06. McEvoy admitted that his mother had given him the gun when he was in Vermont to bring with him to Washington. RP (9/9) 229. Detective Chad Birkenfeld test fired the weapon and found that it was in working order. RP (9/12) 723-24. The protection order issued by the Kitsap County District Court on April 11, 2014 prevented McEvoy from possessing a firearm. CP 378-79.

III. ARGUMENT

A. THE MATTER MUST BE REMANDED FOR ENTRY OF FINDINGS AND CONCLUSIONS SUPPORTING THE EXCEPTIONAL SENTENCE (CONCESSION OF ERROR).

McEvoy argues that the case must be remanded for resentencing because the trial court failed to enter written findings of fact and conclusions of law in support of the exceptional sentence imposed. This claim has merit. The record is clear that the trial court imposed an exceptional sentence and never entered findings and conclusions. The matter should be remanded for that purpose but not for a completely new sentencing hearing.

In S*tate v. Friedlund,* 182 Wn.2d 388, 393, 341 P.3d 280 (2015), the Court held "that an oral colloquy, even if on the record, cannot satisfy the SRA's requirement that findings justifying an exceptional sentence must be in writing." The holding is based upon the plain language of RCW 9.94A.535. The remedy is remand for entry of the omitted findings and conclusions. 182 Wn.2d at 395.

The order on remand in *Friedlund* was for entry of proper findings and conclusions, not for sentencing de novo. The Supreme Court's order allowed that the trial court's belated findings and conclusions could be reentered or the trial court could enter a different set of findings. Id. at

397. Thus the present remand should be for entry of appropriate findings and conclusions only.

B. THE TRIAL COURT DID NOT ERR AT THE REMAND HEARING IN REFUWSING TO REOPEN SENTENCING ISSUES THAT WERE NOT PART OF THE COURT OF APPEALS REMAND ORDER.

McEvoy next claims that the trial court had discretion to consider and impose any lawful sentence at the time of the first remand of the case. He claims that it follows from *Friedlund*, *supra,* that on remand the trial court has discretion to modify its original sentencing pronouncement. This claim is without merit because the trial court on resentencing simply amended the judgment and sentence as ordered by the Court of Appeals and exercised no discretion in doing so.

In re Sorenson involved an issue as to the timeliness of personal restraint petition after a remand for correction of a scrivener's error in the original judgment and sentence. __Wn. App. __, 403 P.3d 109 (2017). Sorenson's petition for review was denied and the Court of Appeals mandate issued. Id. at ¶5. The remand happened sometime later and Sorenson tried to use that date, the date of the order correcting the judgment and sentence, as the date to count from in considering the timeliness of his personal restraint petition. But the Court of Appeals held that the proper date from which to count time was the date of the issuance

of the mandate. Id. at ¶32.

That holding followed from the principle that "[w]here only corrective changes are made to a judgment and sentence by a trial court on remand, there is nothing to review on appeal." Id. at ¶18. Where the appellate court's instructions on remand leave the trial court no discretion as to the actions it can take on remand, further litigation of the merits of the sentence ends at mandate. Id.

The *Sorenson* Court relied on *State v. Kilgore*, 167 Wn.2d 28, 216 P.3d 393 (2009). There, Kilgore was convicted of three counts of child rape and four counts of child molestation and the trial court had imposed an exceptional sentence upward. 167 Wn.2d at 32. Two counts were reversed on appeal and remanded for retrial but the state chose not to retry the counts. Id. Pending correction of the judgement and sentence with regard to the two reversed counts, the United States Supreme court issued its decision in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Kilgore argued that that decision required the trial court to resentence him on remand.

Kilgore had not challenged the exceptional sentence on his first appeal. The case was remanded "for further proceedings," which would include retrying the reversed counts. Id. at 33-34. Upon the state deciding not to retry the counts, the trial court entered an order correcting the

judgment and sentence, which struck the reversed counts and corrected the offender score. Id. at 35.

The *Kilgore* Court was confronted with a finality issue: *Blakely* applied only if the case was pending or not final. Id. That finality analysis is of but tangential importance to the present case, but Kilgore's case was held to be final because no appealable issue remained and thus *Blakeley* did not apply. Holding that the case was final the Supreme Court stated that "a case has no remaining appealable issues where an appellate court issues a mandate reversing one or more counts and affirming the remaining count, and where the trial court exercises no discretion on remand as to the remaining final counts." 167 Wn.2d at 37. More, "[o]nly if the trial court, on remand, exercised its independent judgment, reviewed and ruled again on such issue does it become an appealable question." Id., *quoting State v. Barberio,* 121 Wn.2d 48, 50, 846 P.2d 519 (1993).

A trial court does have the discretion under RAP 2.5(c)(1) to revisit an exceptional sentence on remand when some but not all the counts have been reversed on appeal, but it need not do so. 167 Wn.2d at 41. But if just correcting as ordered, no appealable issue remains. Id. This is so even if the reversed counts change the offender score. Id. at 41-42. It is not an abuse of discretion to refuse to resentence and to proceed to correcting the judgment and sentence as ordered. Id. at 43.

In the present case, the vacation of the two gross misdemeanor violation of no contact order convictions had no effect on McEvoy's offender score. The trial court merely struck the two convictions and the misdemeanor jail time that went with them just as it had been ordered to do by the Court of Appeals. The trial court exercised no discretion as to the exceptional sentence. Moreover, although the trial court may have reconsidered the exceptional sentence at McEvoy's request, it was not an abuse of discretion for it to refuse to so reconsider. There is no error with regard to the procedure used by the trial court.

C. THE PRESENT CHALLENGE TO THE ORIGINAL SENTENCE IS UNTIMELY AND IN ANY EVENT THE ORIGINAL SENTENCE WAS POPERLY IMPOSED.

McEvoy next claims that the original exceptional sentence was unlawful because not in accordance with the purposes of the Sentencing Reform Act, because there were not substantial and compelling reasons for the sentence, because the trial court articulated factors that do not support an exceptional sentence, and because the sentence imposed was clearly excessive. This claim is without merit because McEvoy failed to raise the issue in his first direct appeal and its inclusion here ignores that the time to appeal the exceptional sentence has long passed. Moreover, although the exceptional sentence was not properly supported by written

findings, the trial court committed no error in acting upon the jury's finding of a statutory aggravating fact.

1. Untimely Issue

McEvoy did not challenge the exceptional sentence in his original appeal. RAP 5.2 provided McEvoy with 30 days in which to appeal the exceptional sentence; he did not. Now, more than three years after the trial court's judgment imposing the exceptional sentence, McEvoy seeks to challenge that judgment. McEvoy seems to believe that the judgment and sentence correction hearing at which, as has been seen, the exceptional sentence was not considered, allows him to litigate an issue that he did not timely raise at the time of his initial appeal.

The trial court exercised no discretion with regard to the exceptional sentence when it corrected the judgment and sentence as ordered by this Court. Since the trial court did not apply its discretion to the exceptional sentence at the most recent hearing, McEvoy cannot challenge that exercise of discretion here. He argues against the trial court's discretionary act on October 13, 2014. His argument is untimely and McEvoy advances no argument as to why this Court should review an issue now when mandate on his first appeal issued on November 14, 2016.

Above, the cases reviewed established that there was no abuse of discretion by the trial court in merely correcting its judgment on orders

from this Court. At this correction hearing, the trial court used no discretion with regard to the exceptional sentence. The exceptional sentence is therefore not a justiciable issue in an appeal from the correction hearing.

In S*tate v. Gaut*, an appeal was taken from an order denying a motion to withdraw a plea. 111 Wn. App. 875, 876, 46 P.3d 832 (2002). The Court of Appeals framed the issue:

> But the assignments of error and argument set out in James Gaut's brief have nothing to do with the denial of his motion to withdraw the plea. They focus instead on the underlying and unappealed judgment and sentence. And the time for direct appeal on both has long since run. We therefore dismiss the appeal.

Id. Gaut had pled guilty to child rape and child molestation. Id. He did not appeal. Id. at 879. After the 30 day appeal period had expired, Gaut asserted his motion to withdraw his guilty plea in the trial court. Id. That motion was denied and Gaut appealed from that order. Id. at 879. Gaut argued "various errors to the underlying judgment and the conduct of the plea hearing" on appeal. Id.

The Court of Appeals noted that an appeal may be taken from a guilty plea on grounds of invalid statute, sufficiency of the information, jurisdiction of the court, or the circumstances of the plea. 111 Wn. App. at 880. But Gaut's "assignments of error here, however, are to the underlying judgment and sentence." Thus

> The assignments of error are then precluded from collateral review because no appeal was taken from the judgment and sentence. This is because a conviction may not be collaterally attacked upon a nonconstitutional ground that could have been raised on appeal but was not.

Id. at 880 (internal citation omitted). Although the denial of the post-judgment motion was appealable "our scope of review is limited to the trial court's exercise of discretion in deciding the issues that were raised by the motion." Id. at 881.

Similarly, in the present case, McEvoy attempts to bootstrap a remand hearing at which there was no exercise of trial court discretion into a direct appeal of the original sentencing. The time has passed and this issue should not be addressed.

2. The exceptional sentence was properly imposed.

In the event that McEvoy is allowed to belatedly challenge the exceptional sentence, the present sentence should be affirmed. Further, the state's concession as to the lack of findings of fact and conclusions of law in support of the sentence may impact this issue. The case law often refers to the trial court's findings in determining the validity of the reasons for the exceptional sentence and in determining whether the sentence imposed was clearly excessive.

An exceptional sentence is reviewed for abuse of discretion. *State v. Sao*, 156 Wn. App. 67, 80, 230 P.3d 277 (2010); *but see State v.;*

Kinneman, 120 Wn. App. 327, 346, 84 P.3d 882 (2003) (de novo review applied on question of whether factual findings are substantial and compelling reasons for departure) *review denied* 152 Wn.2d 1022 (2004). Thus, "[a] sentence is clearly excessive if it is based on untenable grounds or untenable reasons or if it is an action no reasonable judge would have taken." Id., *citing State v. Branch*, 129 Wn.2d 635, 649–650, 919 P.2d 1228 (1996). Moreover, "a trial court is under no obligation to "articulate reasons for the length of an exceptional sentence."" 156 Wn. App. at 80, *quoting State v. Ritchie*, 126 Wn.2d 388, 392, 894 P.2d 1308 (1995).

A sentencing court may depart from the standard range "if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. Facts supporting an aggravated sentence must be found by a jury. RCW 9.94A.537(3). Upon such a jury finding, the sentencing court may sentence the offender up to the statutory maximum for the offense so long as the sentencing court has considered the purposes of the SRA and found substantial and compelling reasons. RCW 9.94A.537(6).

One fact that constitutes substantial and compelling reasons for an upward departure is that the "offense occurred within the sight and sound of the victim's or the offender's minor children under the age of eighteen years." RCW 9.94A.535(3)(h)(ii). The imposition of a sentence that

departs from the standard range may be reversed only if the reviewing court finds

> (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

RCW 9.94A.585(4). This provision propounds three questions and varying standards of review:

> (1) Are the reasons given by the sentencing judge supported by evidence in the record? As to this, the standard of review is clearly erroneous. (2) Do the reasons justify a departure from the standard range? This question is reviewed de novo as a matter of law. (3) Is the sentence clearly too excessive or too lenient? The standard of review on this last question is abuse of discretion.

State v, Fisher, 188 Wn. App. 924, ¶55, 355 P.3d 1188 (2015).

In the present case, the jury found the fact that McEvoy's offense occurred within the sight and sound of the minor children of his wife, the victim. McEvoy concedes that this finding satisfies the first clause of the statute—the reason for the departure was supported by the record and support the exceptional sentence as a matter of law. Brief at 17. Moreover, that jury finding satisfies the substantial and compelling ground requirement of the statute as it is a factor found on the exclusive statutory list of facts that support an aggravated sentence; i.e., the jury made the finding and the trial court therefore did not. *See Blakely v. Washington,*

542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) (an exceptional sentence may not be imposed on judicial findings of fact). And, again, the jury's finding of such an aggravating fact itself justifies the imposition of an upward departure. *See State v. Davis,* 146 Wn. App. 714, 721, 192 P.3d 29 (2008) *review denied* 166 Wn.2d 1033 (2009).

McEvoy claims, however, that the departure was clearly excessive and does not comport with the purposes of the SRA.

"The trial court has all but unbridled discretion in fashioning the structure and length of an exceptional sentence." *State v. France,* 176 Wn. App. 463, 470, 308 P.3d 812 (2013) (internal quotation and cite omitted) *review denied* 179 Wn.2d 1015 (2014). As noted above, the statute provides that once correct grounds for a departure are extant, the trial court may sentence up to the statutory maximum for an offense. RCW 9.94A.537(6).

The Supreme Court has noted that the SRA does not require a trial court to articulate its reasons for the length of an exceptional sentence where the statute requires that the sentencing court provide its reasons for imposing an upward departure in the first instance. *State v. Ritchie,* 126 Wn.2d 388, 392, 894 P.2d 1308 (1995). Once the reasons for the departure are established, "[t]here is no such statutory requirement as to the *length* of an exceptional sentence." 126 Wn.2d at 392 (emphasis by

the court).

But the trial court's nearly unbridled discretion is constrained by the notion that the length of the exceptional sentence not be clearly excessive. Here, the legislatively mandated standard of review is abuse of discretion which generates the rule, quoted above, that the length of an upward departure will not be reversed unless it is based upon untenable grounds or untenable reasons.

As to the purpose of the SRA, it is intended to structure sentencing procedure to increase accountability to the public. RCW 9.94A.010. Further, the chapter is intended to

> (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
>
> (2) Promote respect for the law by providing punishment which is just;
>
> (3) Be commensurate with the punishment imposed on others committing similar offenses;
>
> (4) Protect the public;
>
> (5) Offer the offender an opportunity to improve himself or herself;
>
> (6) Make frugal use of the state's and local governments' resources; and
>
> (7) Reduce the risk of reoffending by offenders in the community.

Id. It is important that "only in deciding to *impose* an exceptional sentence is any court directed to consider the general statement of purpose of the

SRA." *State v. Ritchie*, 126 Wn.2d at 392 (emphasis by the court). Further, that being the case, a reviewing court is constrained to follow the scope of review portion of the statute, which, as seen, generates the three questions about the factual basis for, the justification for, and the length of the departure. That is, once the trial court has sufficient legal reasons to impose the exceptional sentence further consideration of the purposes of the SRA is not required. And, again, here the jury provided both the factual basis and the reasons for the departure in this case.

In the present case, and in light of the purpose of the SRA, the trial court ordered an upward departure on tenable and reasonable grounds. The trial court noted the jury's aggravating circumstance finding. RP, 10/13/14, 27. The trial court found that the standard range does not "accurately reflect the nature of the criminal conduct in which the Defendant engaged." Id. The trial court expressly stated that in imposing an exceptional sentence, it was mindful of the responsibility to consider how the "principles underlying the Sentencing Reform Act" applied to the case. Id. And, the trial court articulated one of those purposes in particular—community safety. RP, 11/13/14, 31-32. Although the trial court was troubled by the "enormity of the effect of [McEvoy's] conduct," it noted that those sorts of issues are "taken into account with the standard range." RP, 10/13/14, 29. Finally, the trial court repeated its concern that

the standard range does not reflect the seriousness of the conduct and announced its determination to "give honor to the jurors' findings of the exceptional sentence factor." RP, 11/13/14, 33.

In sum, the trial court correctly exercised its discretion finding that the reasons supplied by the jury's finding were sufficient when taken in light of the principles of the SRA. And, the trial court expressly noted that it was the jury found aggravator that controlled because other considerations of the offenses themselves were already included in the standard range. The trial court followed proper procedure in imposing the sentence. There was no abuse of discretion. This claim, even if timely, fails.

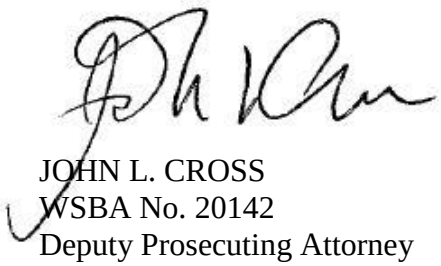
IV. CONCLUSION

For the foregoing reasons, McEvoy's conviction and sentence should be affirmed.

DATED November 8, 2017.

Respectfully submitted,

TINA R. ROBINSON
Prosecuting Attorney



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